Office-Supreme Court, U.S.
FILED
JUL 10 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 268

DANIEL J. LEARY and SADIE D. LEARY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM H. COLLINS
844 Shoreham Building
Washington, D. C.
Attorney for Petitioners

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	Page
Opinions Below	1, 2
Jurisdiction	2
Questions Presented	2, 3
Constitution	3, 13, 14, 15
Statutes Involved	3, 4
Rules of Court	4, 5, 6
Statement of the Case	7
Reason for Granting Writ	9
Argument	9
Conclusion	17

Table of Cases Cited

Campana Corp. v. Harrison (C.C.A.7), 135 F 2d 334	12
37 C.J.S. pages 8, 9	16
Leary v. United States, 330 F (2d) 198	1
Old Colony Trust v. C.I.R. 279 U.S. 716, 73 L.Ed. 918	13
Page v. C.I.R., 297 F (2d) 733	13
Rush v. U.S., 256 F (2d) 862	16
Sartor v. Arkansas Nat. Gas Corp., 321 U.S. 620, 88 L.Ed. 967, 64 SCR 724	12
State v. Hayes et al., 18 Atl. 2d 895, 127 Conn. 543	8
Taylor v. C.I.R., 258 F (2d) 89	13, 10
U.S. v. Stowell, 133 U.S. 1, 10 S. Ct. 244, 33 L.Ed. 555	15
Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914	15

Constitution, Statutes and Rules Cited

U.S. Constitution, 5th, 6th and 14th Amendments	2, 15, 13
26 U.S.C.A. 6212(c)(1)	3
26 U.S.C.A. 6213(a)	3-4
26 U.S.C.A. 6322	4
26 U.S.C.A. 7442	4
28 U.S.C. Sec. 1254(1)	2

	Page
F.R.Civ.P. Rule 56(b) (c) (d) (e) (f)	2
F.R.Civ.P. Rule 56(c)	5
T.C. of U.S. Rule 7(a) (1) (2)	4, 5
T.C. of U.S. Rule 27(c) (3)	5
T.C. of U.S. Rule 31(a) (g)	5, 6
Rules of Civ.P.U.S. Dist. Court (Conn.) Rule 15	6
Rules for U.S. District Court (D.ofC.) Rule 13	6
Rule 19(b) U.S. Supreme Court	9
1945 T.C. Law Decisions Page 112	14
1945 T.C. Memo Decisions Page 115	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ———

DANIEL J. LEARY and SADIE D. LEARY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled cause on March 5, 1964.

OPINIONS BELOW

The opinion rendered by the United States District Court for the District of Connecticut was rendered on May 21, 1963 and is set forth in the Appendix (31a) made a part hereof and otherwise reported in 228 F.Supp. 467.

The per curiam opinion of the United States Court of Appeals for the Second Circuit was rendered on March 5, 1964, and is reported in 330 Fed. (2nd) 497 and is also set forth in the Appendix (1a, 2a) and made a part hereof.

A motion for rehearing made by the petitioners in the United States Court of Appeals for the Second Circuit was denied on April 13, 1964 (Trans. for Second Circuit page 33A) and also set forth in Appendix (3a) to this petition at page . .

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and Rule 56(b)(c)(d)(e)(f), of the Federal Rules of Civil Procedure.

QUESTIONS PRESENTED

1. That the United States District Court for the District of Connecticut erred in granting summary judgment because of the fact that there remained disputed facts in the case that should have been adjudicated by trial and said decision and the affirmance thereof by the United States Court of Appeals for the Second Circuit is at variance with Rule 56 of Federal Rules of Civil Procedure and adjudicated cases by this Court and other Federal jurisdictions.

2. That the United States District Court for the District of Connecticut erred in determining that the plaintiff (the Government) below was entitled to summary judgment without a hearing first had on certain disputed facts, because said decision by the United States District Court for the District of Connecticut was at variance with the provisions of Rule 56, Federal Rules of Civil Procedure; that the affirmance of said action by the aforesaid District Court by the United States Circuit Court of Appeals for the Second Circuit was likewise in error and contrary to adjudicated cases of this Honorable Court and other Federal Circuit Courts.

3. That the aforesaid decision of the District Court and affirmance thereof by the United States Court of Appeals

for the Second Circuit was in violation of the due process provision of both the Fifth and the Fourteenth Amendments to the Constitution of the United States in that it accomplished a forfeiture against the petitioners without due process.

CONSTITUTION

Due Process—5th, 6th and 14th Amendments.

STATUTES INVOLVED

Title 26 U.S.C.A. 6212(c)(1):

> "General rule. If the Secretary or his delegate has mailed to the taxpayer a notice of deficiency as provided in subsection (a), the Secretary or his delegate shall have no right to determine any additional deficiency of income tax for the same taxable year, of gift tax for the same calendar year, or of estate tax in respect of the taxable estate of the same decedent, except in the case of fraud, and except as provided in section 6214(a) (relating to assertion of greater deficiencies before the Tax Court), in section 6213(b)(1) (relating to mathematical errors), or in section 6861(c) (relating to the making of jeopardy assessments)."

Title 26 U.S.C.A. 6213(a):

> "Time for filing petition and restriction on assessment. Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A

or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court".

Title 26 U.S.C.A. 6322:

"Period of lien. Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68a Stat. 779."

Title 26 U.S.C.A. 7442:

"Jurisdiction. The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 879."

See historical note.

RULES OF COURT

Tax Court of U.S. Rule 7(a)(1)(2):

"(a) Petition

(1) Filing. A Case shall be initiated by filing with the Court a petition consisting of an original and 4 complete, accurately conformed, clear copies, either printed or typed (See Rules 4 and 6).

(2) Improper petition—Dismissal. Failure of a petition to comply with this Rule or with Rule 4 or 6 shall be ground for dismissal of the case.

See also section 6213(a), and section 7502, Code of 1954, in regard to absolute statutory time limit on filing."

Tax Court of U.S. Rule 27(c)(3):

"Attendance at trials. The unexcused absence of a party or his counsel when a case is called for trial will not be the occasion for delay. The case may be dismissed for failure properly to prosecute or the trial may proceed and the case be regarded as submitted on the part of the absent party or parties."

Tax Court of U.S Rule 31(a) and (g):

(a) "Rules applicable—The trials before the Court and its Divisions will be conducted in accordance with the rules of evidence applicable in trials without a jury in the United States District Court for the District of Columbia. With reference to the examination of unwilling or hostile witnesses, see Rule 43(b) of the Rules of Civil Procedure for the United States District Courts.

(g) "Failure of proof—Failure to adduce evidence in support of the material facts alleged by the party having the burden of proof and denied by his adversary may be ground for dismissal."

Federal Rules of Civil Procedure Rule 56(c):

"Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if *the pleadings, depositions, and admissions on file, together with* the affidavits, if any, *show that there is no genuine issue as to any* material fact and that the moving party is entitled to a judgment as a matter of law.

A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, eff. March 19, 1948" (emphasis supplied).

Rules of Civil Procedure U.S. District Court (Conn.), Rule 15:

"Dismissal of Actions for Failure to Prosecute. In civil actions in which no action has been taken by the parties for one year, the clerk shall give notice of proposed dismissal to counsel of record on or before the first of September in each year. If such notice has been given and no action has been taken in any civil action in the meantime and no satisfactory explanation is submitted to the court within thirty days thereafter, the clerk shall enter an order of dismissal. Any such order entered by the clerk under this rule may be suspended, altered, or rescinded by the court for cause shown."

Rules for U. S. District Court for the District of Columbia, Rule 13:

"Dismissal without Prejudice; Notice of; Warning. If a party seeking affirmative relief fails for six months from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his claim, or to avail of a right arising through the default or failure of an adverse party, or take action looking to the prosecution of his claim, or to file a certificate of readiness under Rule 11(d) within six months of the date the action is called on the call of the civil calendar, the complaint, counterclaim, cross-claim, or third party complaint of said party, as the case may be, shall stand dismissed without prejudice, whereupon the Clerk shall make entry of that fact and serve notice thereof by mail upon every party not in default for failure to appear, of which mailing he shall make an entry".

STATEMENT OF THE CASE

Petitioners Daniel J. Leary and his wife Sadie D. Leary on June 7, 1940 received notice by registered mail of alleged deficiency on taxes for the years 1934 and 1935 and the petitioner Daniel J. Leary on June 7, 1940 received notice by registered mail of alleged deficiency on taxes for the year 1933. Subsequent to the tax years (1933, 1934 and 1935) but before the assessments (*supra*), in May 1938 the petitioner Daniel J. Leary, then a City of Waterbury official, and others were charged in the Superior Court of Connecticut with the criminal offense of conspiracy to defraud. The petitioner and others were duly tried and convicted and appealed that conviction to the State Court of Appeals. The conviction as to the petitioner and some others was affirmed; 18 A.2d 895, 127 Conn. 543.

Apparently this trouble brought on the tax investigation and the alleged deficiencies (*supra*) which were sent by registered mail on June 7, 1940, a short time before the conviction in the criminal case.

Following the registered notices of assessments aforementioned on October 9, 1940 petitions were filed in the Board of Tax Appeals in behalf of the petitioners herein (see Complaint 1707 and 1708—App. (22a-26a)

It was contended on behalf of the petitioners at the hearings on the Motion for Summary Judgment that the Board of Tax Appeals' decisions were void because the petition had not been filed within ninety days as provided by the Revenue Code and also by rule of the Board of Tax Appeals (now the Tax Court).

The District Court trial judge in the face of this point raised by the petitioners asked the attorneys for respondent if they desired time to amend the complaint. Respondent counsel answered that they would like time to amend. The trial judge continued the hearing on the Motion for

four weeks (App. Actually the adjourned hearing was not had until April 22, 1963 (App. 12a) at which time no amended pleadings were filed as to the point raised (*supra*). The respondent did offer in evidence affidavits from representatives of the Internal Revenue Bureau which were improperly received on a Motion for Summary Judgment. The respondent also presented a photostatic copy of the docket entries for the Tax Court which were likewise improperly received on a Motion for Summary Judgment. After the adjourned hearing held on April 22, 1963 the trial judge took the matter under advisement and on May 17, 1963 granted the Motion for Summary Judgment on cases 626, 1707 and 1708 consolidated (App.

The case of *State* v. *Hayes et al.*, 18 Atl. 2d 895, 127 Conn. 543 was decided on March 4, 1941 and immediately following that decision the petitioner Daniel J. Leary left the jurisdiction and returned some time in early 1946.

The petition in the Board of Tax Appeals was not put down for hearing until November 1944 at which time the petitioner Daniel J. Leary was still absent. The individual who had filed the petition in the Board of Tax Appeals did not appear at the hearing and at the outset the hearing officer was advised by counsel for the Internal Revenue Bureau that he had received a communication from the individual who had filed the petition on behalf of the petitioners advising that he would not be present because he had not been able to confer with the petitioner and had no documentary evidence available to him at that time. The hearing officer insisted that the hearing be had and announced that proceedings would be instituted to disbar the record representative (an accountant—not a lawyer) of the petitioner Daniel J. Leary and such proceedings were subsequently instituted and the individual was disbarred. The details of this situation are set forth at the outset of the hearing officer's opinion starting at page 115 1945 T.C. Memorandum Decisions.

At the hearing on the Motion for Summary Judgment counsel for the petitioners urged to the Court that the decision of the Board of Tax Appeals was void not only for the reasons heretofore indicated (*supra*) but for the additional reason that proceeding in the absence of the petitioner accomplished a forfeiture without due process as contemplated by the Constitution of the United States.

REASON FOR GRANTING WRIT

The petitioners assert that a Writ of Certiorari should be granted in this case under Rule 19(b) of this Court, because the United States Court of Appeals for the Second Circuit has rendered the decision affirming a judgment of the United States District Court for the District of Connecticut, the effect of which is to sanction a departure from the accepted and usual course of judicial proceedings by the Trial Court so as to call for an exercise of this Court's power of supervision.

ARGUMENT

1. That the District Court erred in granting Summary Judgment because of disputed facts in this case.
2. That the District Court erred in determining that the respondent below was entitled to judgment without a hearing first had on said disputed facts.

The petitioners believe that the suggested errors committed by the Trial Judge, add up to the conclusion that the petitioners were denied due process under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and therefore the assignments will be discussed as one.

At the outset it must be borne in mind that the Motion for Summary Judgment under consolidated cases 626, 1707 and 1708 presented the clear cut question as to

whether the petitioners were entitled to be heard under circumstances that they might have disputed the contentions that were being made.

It is respectfully urged to this Court that on the consolidated Motion for Summary Judgment below there were issues of fact and Law that remained to be determined and should not be passed over by the preemptory granting of the Motion for Summary Judgment.

Remember we must that the basis of this litigation had its inception back in 1933-4 and 5 touching the Federal Income Tax returns made by the petitioners for those years and suggested deficiencies in connection therewith.

The deficiencies urged by the Internal Revenue Bureau of the United States were first brought to the attention of the petitioners on October 9, 1940, more than 5 years after the last of the three tax returns were filed. The Trial Judge had judicial notice that the male petitioner Daniel J. Leary along with others was charged in May 1938 in the Connecticut Superior Court with the crime of conspiracy to defraud; that he and others having been convicted, appealed to the Court of Appeals for the State of Connecticut and the conviction previously had was affirmed as to the petitioner Daniel J. Leary and some of the others, 18 Atl. (2d) 895, 127 Conn. 543-606.

It is readily apparent that the attention of the Internal Revenue Bureau was attracted to the petitioners' tax wise from the circumstances and publicity surrounding the trial in the State Court.

On June 7, 1940, even before the Criminal trial of the petitioner Daniel J. Leary, the Commissioner of Internal Revenue sent notices by registered mail to the petitioners in which suggested deficiencies were urged as to tax returns made for the years 1933-4 and 5.

Under Title 26 U.S.C.A. 6213(a) (*supra*) the petitioner taxpayers were privileged to file a petition in the

then Board of Tax Appeals for the United States (now the Tax Court of the United States) for a redetermination of the suggested deficiencies posed by the Commissioner of Internal Revenue.

Complaint in case No. 1707 (App. 22a) in paragraph 6 alleges that the Commissioner did send his notices of deficiencies on June 7, 1940 and in paragraph VI of said complaint (App. 23a) alleged directly and not under *videlecit* that on the 9th day of October 1940 the petitioners filed a petition with the U. S. Board of Tax Appeals for a redetermination of the Commissioner's determination of suggested deficiencies.

Under the provisions of Title 26 U.S.C.A. Section 6213(a) (*supra*) the time within which a petition to the then Board of Tax Appeals could be made was restricted to 90 days after the date of receipt of registered notice. It is notably apparent that October 9, 1940 is more than 90 days after June 7, 1940.

Petitioner did point out also that under Rule 7A(1)(2) of the Rules of the Tax Court of the United States (which were the same on October 9, 1940) the provisions of Title 26 U.S.C.A. Section 6213(a) (*supra*) are listed as a procedural requirement for jurisdiction of the Board of Tax Appeals.

In connection with this subject matter, it is to be noted (App. 9a) under date of January 28, 1963 that Counsel for the petitioners urged to the Court at hearing in the Motion for Summary Judgment that the Board of Tax Appeals had no jurisdiction to hear the case. The Trial Judge on request of the counsel for the respondent granted leave to the respondent to amend complaints and motion within three weeks. It should also be noted that it is disclosed by the Appendix beginning at 5a and ending at 11a of said Appendix, all covering docket entries, that there was no amended complaint or amended motion filed.

It is to be noted however that instead of amending the complaint or motion, the respondent filed exhibits 1 to 9, all of which appear in the record beginning at page 52 to 103 and are evidently documents not intended to assist the Trial Judge in piercing what is sometimes called "the pleading veil" but on the contrary intended to support in an evidentiary way the deficiency assessments that the Commissioner had long ago made.

It is hardly necessary to suggest that these exhibits were filed over the protest of the petitioners and moreover the accepting of same denied due process to the petitioners in the sense that they were not afforded the opportunity to cross-examine the affiants and others involved as such documents attempted to support the allegations of the complaints.

Motion for Summary Judgment should be sustained only where there is no genuine issue as to *any* material fact and the moving party is entitled to a judgment as a matter of law. This pronouncement has been made by the Supreme Court of the United States in *Sartor* v. *Arkansas National Gas Corp.*, 321 U.S. 620, 88 L.ed. 967, 64 S C R 724 and innumerable cases announcing this doctrine as same is annotated under Rule 56 of the Federal Rules of Civil Procedure.

Also well established is the rule that on Motion for Summary Judgment, affidavits filed in their support may be considered for the purpose only of ascertaining whether an issue of fact is presented by the pleadings; but they cannot be used as a basis for deciding the fact issue. See *Campana Corp.* v. *Harrison* (C.C.A. 7), 135 F 2d 334 and many other annotations under item 50 of Annotations to Rule 56.

This Court is also invited to have in mind in the overall consideration of this subject matter that case No. 626 was filed on July 7, 1941, (App. 13a); the complaint in case No. 1707 was filed on April 11, 1946 (App.

25a), and the complaint in 1708 was likewise filed on April 11, 1946 (App. 26a).

Also it is to be borne in mind that the conviction of the petitioner Daniel J. Leary and some others was affirmed in the State Court on March 4, 1941, 18 At (2d) 895, 127 Conn. 543. Immediately following this decision the petitioner Daniel J. Leary left the jurisdiction and the respondent in the face of this situation filed its civil case 626 below on June 3, 1941 and the hearing of the case before the Board of Tax Appeals was not had until November 1944 more than four years after the complaint was filed and the decision of that Board was made on January 24, 1945 as appears in 1945 T. C. Law Decisions at page 112.

In this latter decision (*supra*) page 115 the Tax Court sets forth the fact that nobody appeared on behalf of the petitioner Daniel J. Leary and the Tax Board was advised by counsel for respondent that he had a communication from the record representative of Daniel J. Leary who advised that he had not been able to confer with Mr. Leary and had no documents or other data available to him in order to intelligently represents the subject's interest at the hearing. This representative of the petitioner in that proceeding was not a lawyer but a suggested C.P.A. which type of representation is tolerated by that Board, now called the Tax Court of the United States, although the Supreme Court of the United States since the change of designation has indicated that the organization is still not a court. This demonstrates that the petitioner was not accorded adequate representation as contemplated under Amend 6—U.S. Const.

See:

Old Colony Trust Co. v. *C.I.R.*, 279 U.S. 716, 73 L. Ed. 918;
Page v. *C.I.R.* 297 F (2d) 733;
Taylor v. *C.I.R.*, 258 F (2d) 89.

The Board of Tax Appeals, notwithstanding the absence of Daniel J. Leary, the main taxpayer and his representative, proceeded its hearing on the case and made its decision (1945 T.C. Law Decisions 112).

The requirements of said Board of Tax Appeals then and now should have prompted the Board to dismiss the taxpayer's petition (Rule 7(a)(1)(2), Rule 27(c)(3), and Rule 31(a) and (g) *supra*).

See also respondent's Exhibit 6 as set forth in record pages 82 and 83.

Rule 31(a) of Tax Court Rules (*supra*) makes the procedure accord with Rules of the U.S. District Court of the District of Columbia. Rule 13 of said Court (*supra*) provides for dismissal by the Clerk as does Rule 15 (*supra*) Rules of U.S. District Court for the District of Connecticut for failure to prosecute.

Rule 15 (*supra*) of the U.S. District Court for the District of Connecticut requires Clerk of said Court to give notice of proposed dismissal "on or before the 1st of September in each year."

The docket entries (App. 5a-12a) show no such action as taken by the Clerk.

This Supreme Court should in addition consider the fact that in the light of the above detailed happenings the respondent on June 3, 1941 filed bill of complaint in case 626. Apparently the respondent in the face of the situation at the Board of Tax Appeals then did not feel that it wanted to depend upon the decision of said Board, and therefore filed Civil Case 626.

The respondent again changed its mind on April 11, 1946, five years later and decided that it would ask the District Court for judgment on the basis of the Board of Tax Appeals' decision in Civil Cases Nos. 1707 and 1708.

In 1963, 22 years after the alleged decision by the Board of Tax Appeals the respondent suddenly feels the need of filing a Motion for Summary Judgment instead of placing the matter on the trial calendar.

As indicated in Title 26 U.S.C.A. 6322 (*supra*) there comes a time when a tax liability could become unenforceable by reason of lapse of time and there would appear beyond question that in this instance there has been a *lapse* of time.

The petitioners urge that the effect of the Lower Court granting of Motion for Sumary Judgment has accomplished a forfeiture against the petitioners without due process (U.S. Const. Amendts. 5 and 14).

In the case of *U.S.* v. *Stowell*, 133 U.S. 1, at page 17 10 Sct. 244, 33 L. Ed. 555 the Court said:

> "But the law requires proceedings to be instituted for the purpose of ascertaining the facts of the forfeiture (*Wessels* v. *Beeman*, 87 Mich. 481, 490 (49 N.W. 483), and the inchoate title of the state to the good forfeited is not fully consummated until after judicial condemnation has been had. (*Caldwell* v. *U.S.*, 49 U.S. [8 How.] 366, 381, (12 L.Ed. 1115): *Tracy* v. *Corse*, 58 N.Y. 143, 149)."

In the said *U.S.* v. *Stowell* (*supra*), the Court further observed:

> "By the settled doctrine of this Court, whenever a statute enacts that upon the commission of a certain act, specific property * * * shall be forfeited * * * title is not perfected until judicial condemnation * * *"

In *Windsor* v. *McVeigh*, 93 U.S. 274, 23 L. Ed. 914.

> "Here, the Supreme Court held that a 'decree of condemnation * * * without allowing the owner (a confederate) of the property to appear * * * interpose his claim for the property, and answer libel'

was without validity and that such property could not be forfeited when he was not allowed to appear and make answer. The Court said (p. 915):

> "'A different result would be a blot upon our jurisprudence and civilization * * * It would be contrary to the first principles of the social compact and of the right administration of justice'."

In 37 C.J.S. pages 8, 9 cases cited, it is stated:

> "Forfeitures are not favored; they are considered harsh exactions odious and to be avoided when possible—where a liberal construction of a statute will avoid the imposition of a forfeiture, it will be so construed. On the other hand, a statute imposing a forfeiture should be construed strictly and in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation.—forfeitures are never to be inferred from doubtful language."

See also: *Rush* v. *U.S.*, 256 F (2d) 862.

This Court's attention is finally directed to that portion of the per curium opinion rendered by the United States Court of Appeals for the Second Circuit at 330 F (2d) 498 reading as follows:

> "The uncontested affidavit of debt discloses that the amounts claimed to be due totaled $420,250.05."

The affidavit therein being referred to by the Appellate Court was an affidavit filed at the continued hearing on the Motion for Summary Judgment (Docket Index page 5a Record United States District Court for the District of Connecticut, this Appendix page (11a).

The petitioners again point out that they had no right to test issues under a Motion for Summary Judgment (*supra*)

This action by the District Court, which the Appellate Court has affirmed, as already indicated by the decisions

(*supra*) does violence to the provisions of Rule 56 Federal Rules of Civil Procedure and the due process provisions of the Fifth and Fourteenth Amendments to the Constitution. The inescapable effect of this action is to accomplish forfeiture against the petitioners as has otherwise been pointed to in cases set forth (*supra*).

CONCLUSION

The premises considered, it is respectfully urged that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM H. COLLINS
844 Shoreham Building
Washington, D. C.
Attorney for Petitioners

INDEX TO APPENDIX

	Page
Opinion	1a-2a
Denial of Petition for Rehearing	3a
Pertinent Docket Entries (Cir. No. 626)	5a-7a
Pertinent Docket Entries (Cir. Nos. 1707 & 1708)	8a-12a
Complaint Cir. No. 626	13a
Complaint Cir. No. 1707	22a
Complaint Cir. No. 1708	26a
Motion for Summary Judgment	30a
Partial Summary Judgment	31a
Notice of Appeal	32a

APPENDIX

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 335, 336, 337—September Term, 1963.

(Argued March 5, 1964 Decided March 5, 1964.)

Docket Nos. 28485, 28486, 28487

UNITED STATES OF AMERICA,
Appellee,

v.

DANIEL J. LEARY and SADIE D. LEARY,
Appellants.

Before:

WATERMAN and KAUFMAN, *Circuit Judges,*
DIMOCK, *District Judge.**

Appeal from decision and judgment of the United States District Court for the District of Connecticut, Blumenfeld, *J.*, granting appellee Government's motion for summary judgment in three cases brought against appellants for the collection of back income taxes, penalties, and interest. Affirmed.

---

* Sitting by designation.

LOUIS F. OBERDORFER, Asst. Attorney General; Lee A. Jackson, Robert N. Anderson Richard B. Buhrman, Attys., Dept. of Justice, Washington, D. C. (Robert Zampano, U. S. Attorney, of counsel), *for Appellee.*

WILLIAM H. COLLINS, Washington, D. C., *for Appellants.*

PER CURIAM:

The judgment of May 22, 1963 is affirmed in open court upon the unreported opinion below of Judge Blumenfeld in the United States District Court for the District of Connecticut, wherein, atfer consolidation of three cases, the Government's motion for summary judgment was granted on the ground that the complaints in each of the cases, together with such answers as defendants filed, created no factual issues requiring trial.

The taxable years involved in these cases were the years 1933, 1934, and 1935. The uncontested affidavit of debt discloses that the amounts claimed to be due totaled $420,250.05. One of the three cases was commenced 23 years ago; the other two, 18 years ago. We are satisfied that the delay in obtaining of judgment in the consolidated case was not entirely the fault of the Government; but we cannot refrain trom pointing out that, because of intertest accumulations, the judgment now obtained is substantially in excess of double the amount of the taxes claimed to have been due and unpaid; and, in affirming the judgment below, we do not wish to imply that we approve this sort of delay. Nevertheless, as we are satisfied that neither the Government nor the taxpayers have been prejudiced, the judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DANIEL J. LEARY and SADIE D. LEARY,
Defendants-Appellants.

On Petition for Rehearing

William H. Collins, Washington, D. C.
for Defendants-Appellants.

Petition denied.

S.R.W.
I.R.K.
U.S.C.JJ.

E.J.D.
U.S.D.J.

April 13, 1964

United States District Court

District of Connecticut

(Tr. pp. A-B)

UNITED STATES OF AMERICA,

v.

DANIEL J. LEARY, SADIE D. LEARY, DANIEL J. LEARY (Son), TRAVELERS LIFE INSURANCE COMPANY, a Corporation, SUN LIFE ASSURANCE COMPANY OF CANADA, AETNA LIFE INSURANCE COMPANY, Corporation, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a Corporation.

Pertinent Docket Entries (Civil No. 626)

July 3, 1941—Bill of complain filed under Secs. 3678, 3744 and 3800 of the Internal Revenue Code, claiming judgment in the amount of $370,261.96 with interest.

July 3, 1941—Summons issued and with copies of said bill of complaint handed to the marshal for service.

July 10, 1941—Summons returned showing service.

July 23, 1941—Amended Complain filed.

* * *

July 23, 1941—Summons issued and with copies of Amended Complaint handed to the Marshal for service.

* * *

Pertinent Docket Entries (Civil No. 626)

Oct. 16, 1941—Answer of defendant Sadie D. Leary filed in duplicate and duplicate mailed to U. S. Atty.

* * *

Sept. 12, 1962—Appearance of Albert G. Murphy entered for the defendant Daniel J. Leary.

* * *

Sept. 22, 1962—Memorandum in Lieu of Pre-Trial Order, filed. Blumenfeld, J. Copies mailed Messrs. Murphy, Brodigan and Day, Berry & Howard and U.S. Atty. (3).

Oct. 25, 1962—Motion for Summary Judgment filed by plaintiff.

Oct. 25, 1962—Notice of Mo n, filed by plaintiff.

Oct. 25, 1962—Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, filed.

Jan. 28, 1963—Hearing on Plaintiff's Motion for Summary Judgment continued for 4 weeks. Blumenfeld, J. William Collins, Wash., D. C., appearance with notation on Motion for Summary Judgment, filed.

Jan. 28, 1963—Appearance of William H. Collins entered for defendant Daniel J. Leary on motion for summary judgment.

Apr. 4, 1963—Hearing on Plaintiff's Motion for Summary Judgment. Decision Reserved. Blumenfeld, J. Government Exhibits 6, 7, 8 and 9 submitted to Judge Blumenfeld, filed. (Certified copies of documents from tax Court and District Director of I.R.S. —all were submitted with Govt. brief.)

Pertinent Docket Entries (Civil No. 626)

May 17, 1963—Ruling on Motion for Summary Judgment entered. Government's Motion granted. Judgment to be entered consolidating Civil Nos. 626, 1707 and 1708 under Civil 626. Blumenfeld, J. Copies mailed Messrs. Day, Berry & Howard; Gross, Hyde & Williams; Murphy; and Brodigan, and on 5/21 copies sent J. O'Connor, Asst. U. S. Atty. and Wm. Collins, and Atty., Dept. of Justice, Washington.

May 22, 1963—Partial Summary Judgment entered that Civil Actions 1707 and 1708 are consolidated with Civil 626; that the plaintiff recover of the defendant Daniel J. Leary the sum of $996,278.69 and of the defendant Sadie D. Leary $750,511.09 of that sum and that the plaintiff recover its cost of action. Blumenfeld, J. Copies mailed Messrs. Day, Berry & Howard, Gross, Hyde & Williams; Murphy; and Brodigan; also, Asst. U. S. Atty. O'Connor and Atty. Collins at Washington.

* * *

July 19, 1963—Notice of Appeal filed. Copies mailed Messrs. Murphy, Brodigan and U. S. Attorney Collins.

* * *

Aug. 26, 1963—Order entered Extending Time Within Which to File Record on Appeal and Docket Appeal to Sept 30, 1963. Anderson, J. Copies mailed Messrs. Collins, Murphy, Zampano and O'Connor.

* * *

Sept. 26, 1963—Stipulation re Contents of Record on Appeal, filed.

Pertinent Docket Entries (Civil Nos. 1707 and 1708)

(Tr. pp. C-E)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[SAME TITLE]

Civil No. 1707

Apr. 12, 1946—Bill of complaint demanding judgment for the full amount of $314,519.87, together with interest as allowed by law, and for costs, filed by authorization of the Commissioner of Internal Revenue of the U. S. Treasury Department.

Apr. 12, 1946—Summons issued and with copies of said complaint handed to the marshal for service.

Apr. 18, 1946—Summons returned showing service.

* * *

Jan. 20, 1953—First Amended Complaint filed and with order and copies handed to the marshal to serve.

Jan. 19, 1953—Hearing on motion to file first amended complaint. Court granted the Motion to add defendants and extended time to answer to 90 days from today. Smith, J.

* * *

July 1, 1953—Appearance filed.

Oct. 19, 1953—Answer to first amended complain filed.

* * *

Pertinent Docket Entries (Civil Nos. 1707 and 1708)

Civil No. 1707

Jan. 15, 1958—Amendment to first amended complaint filed.

• • •

Sept. 12, 1962—Appearance of Albert G. Murphy entered for the defendant Daniel J. Leary.

Sept. 22, 1962—Memorandum in Lieu of Pre-Trial Order, filed. Blumenfeld, J. Copies mailed Messrs. Murphy, Brodigan and Day, Berry & Howard and U. S. Atty.

Oct. 25, 1962—Motion for Summary Judgment filed by plaintiff.

Oct. 25, 1962—Notice of Motion filed by plaintiff.

• • •

Jan. 28, 1963—Hearing on Plaintiff's Motion for Summary Judgment Continued for 4 weeks. Blumenfeld, J. Complaint and Motion may be amended within 3 weeks. Appearance of Wm. Collins, Wash., D. C., with notation on Motion for Summary Judgment filed.

Jan. 28, 1963—Appearance of William H. Collins entered for defendant Daniel J. Leary on Motion for Summary Judgment, filed.

Apr. 22, 1963—Hearing on Plaintiff's Motion for Summary Judgment. Decision Reserved. Blumenfeld. J. Govt. Exhibits 6, 7, 8 and 9 submitted to Judge Blumenfeld, filed. Certified copies of documents from tax Court and District Director of I.R.S.—all were submitted with Govt. brief.

Pertinent Docket Entries (Civil Nos. 1707 and 1708)

Civil No. 1707

May 17, 1963—Ruling on Motion for Summary Judgment entered. Motion granted. Judgment to be entered consolidating Civil Nos. 626, 1707 and 1708 under Civil 626. Blumenfeld, J. Copies mailed Day, Berry & Howard; Gross, Hyde & Williams; Murphy; and Brodigan. Also on 5/21/63 copies mailed Atty. Collins and Asst. U. S. Atty. O'Connor.

May 22, 1963—Partial Summary Judgment entered consolidating Civil Actions 1707 and 1708 with Civil 626; that the plaintiff recover of the defendant Daniel J. Leary the sum of $996,278.69 and of the defendant Sadie D. Leary $750,511.09 of that sum and that the plaintiff recover its costs of action. Blumenfeld, J. Copies mailed Day, Berry & Howard; Gross, Hyde & Williams; Murphy; Brodigan, O'Connor and Collins.

* * *

July 19, 1963—Notice of Appeal filed. Copies mailed.

Sept. 26, 1963—Stipulation re Contents of Record on Appeal, filed.

Civil No. 1708

Apr. 12, 1946—Bill of complaint demanding judgment against the defendant for the full amount of $119,912.55 together with interest as allowed by law and for costs, filed.

Apr. 12, 1946—Summons issued and with copy of said complaint handed to the marshal for service.

Pertinent Docket Entries (Civil Nos. 1707 and 1708)

Civil No. 1708

Apr. 18, 1946—Summons returned showing service.

* * * *

Sept. 12, 1962—Appearance of Albert G. Murphy entered for the defendant Daniel J. Leary.

Sept. 22, 1962—Memorandum in Lieu of Pre-Trial order, filed. Blumenfeld, J. Copies mailed Atty. Murphy and U. S. Atty.

Oct. 25, 1962—Motion for Summary Judgment, filed by plaintiff.

Oct. 25, 1962—Notice of Motion filed by plaintiff.

* * *

Jan. 28, 1963—Hearing on Plaintiff's Motion for Summary Judgment continued for 4 weeks. Blumenfeld, J. Complaint and Motion may be amended within 3 weeks. Appearance of Wm. Collins, Wash., D. C., with notation on Motion for Summary Judgment, filed.

Jan. 28, 1963—Appearance of William H. Collins entered for defendant Daniel J. Leary on Motion for Summary Judgment, filed.

Apr. 22, 1963—Hearing on Plaintiff's Motion for Summary Judgment. Decision Reserved. Blumenfeld, J. Govt. Exhibits 6, 7, 8 and 9 submitted to Judge Blumenfeld, filed. (Certified copies of documents from tax Court and District Director of I.R.S.—all were submitted with Govt. brief.)

Pertinent Docket Entries (Civil Nos. 1707 and 1708)

Civil No. 1708

May 17, 1963—Ruling on Motion for Summary Judgment entered. Motion granted. Judgment can be entered consolidating Civil Nos. 626, 1707 and 1708 under Civil 626. Blumenfeld, J. Copies mailed Messrs. Day, Berry & Howard; Gross, Hyde & Williams; Murphy and Brodigan. Also on 5/21/63 copies mailed Asst. U. S. Atty. O'Connor and Atty. Collins.

May 22, 1963—Partial Summary Judgment entered that Civil 1707 and 1708 are consolidated with 626; that the plaintiff recover of the defendant Daniel J. Leary the sum of $996-278.69 and of the defendant Sadie D. Leary $750,511.09 of that sum and that the plaintiff recover its costs of action. Blumenfeld, J. Copies mailed Messrs. Day, Berry & Howard; Gross, Hyde & Williams; Murphy; Brodigan; O'Connor and Collins.

July 19, 1963—Notice of Appeal filed. Copies mailed.

Sept. 26, 1963—Stipulation re Contents of Record on Appeal, filed.

Complaint in Civil No. 626

(Tr. pp. 1-10)

IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF CONNECTICUT

[SAME TITLE]

I.

This is a suit of a civil nature arising under a law of Congress providing for internal revenue and the collection thereof, prosecuted under the authority and direction of the Attorney General of the United States with the sanction and at the request of the Commissioner of Internal Revenue.

II.

This Court has jurisdiction of this case under the provisions of Section 3678, Section 3744 and Section 3800 of the Internal Revenue Code.

III.

The defendant, Daniel J. Leary, is a citizen and resident of the City of Waterbury, State of Connecticut, and subject to the jurisdiction of this Court.

IV.

The defendant, Mrs. Sadie D. Leary, is a citizen and resident of the City of Waterbury, State of Connecticut, and subject to the jurisdiction of this Court.

V.

The defendant, Daniel J. Leary (Son), is a citizen and resident of the City of Waterbury, State of Connecticut, and subject to the jurisdiction of this Court.

VI.

The Travelers Life Insurance Company is and at all material times hereinafter mentioned, was an insurance corporation authorized to do business in the State of Connecticut and within the jurisdiction of this Court and subject to service of process in actions or suits in this Court.

VII.

The Sun Life Assurance Company of Canada, is and at all material times hereinafter mentioned, was an insurance corporation authorized to do business in the State of Connecticut and within the jurisdiction of this Court and subject to service of process in actions or suits in this Court.

VIII.

The Aetna Life Insurance Company is and at all material times hereinafter mentioned, was an insurance corporation authorized to do business in the State of Connecticut and within the jurisdiction of this Court and subject to service of process in actions or suits in this Court.

IX.

The John Hancock Mutual Life Insurance Company is and at all material times hereinafter mentioned was an insurance corporation authorized to do business in the State of Connecticut and within the jurisdiction of this Court and subject to service of process in actions or suits in this Court.

X.

On April 15, 1940, the Commissioner of Internal Revenue made jeopardy assessments against the defendants Daniel J. Leary and Sadie D. Leary, jointly and severally, of tax, penalty and interest for the years 1933, 1934 and 1935, in the respective amounts of $53,108.57, $205,538.74 and $11,614.65.

XI.

The Collector of Internal Revenue on April 17, 1940, served notice and demand upon the defendants Daniel J. Leary and Sadie D. Leary, for payments of the amounts so assessed. Although notice and demand was made upon the defendants Daniel J. Leary and Sadie D. Leary, no payments were made to the Collector.

XII.

The defendant Travelers Life Insurance Company issued a life insurance policy No. 1800154 upon the life of the Defendant Daniel J. Leary, which had a net cash value of $20,265.15 on March 26, 1940, payable according to the terms of the contract in seven annual installments of $3,242.42 each. A notice of levy (Treasury Form 668-A) notifying the defendant Travelers Life Insurance Company of the taxes due the United States, jointly and severally from Daniel J. Leary and Sadie D. Leary, was served on or about April 17, 1940. A final notice and demand (Treasury Form 668-C) was served on the defendant, the Travelers Life Insurance Company on or about August 13, 1940. The defendant, Travelers Life Insurance Company refused, failed and has failed to pay over to the Collector pursuant to such demands any of the property or rights to property belonging to or owned by Daniel J. Leary and Sadie D. Leary in the insurance policy above-mentioned.

XIII.

The Sun Life Assurance Company of Canada issued a life insurance policy No. 1211995 on the life of the defendant Daniel J. Leary. The plaintiff is informed and believes and therefore alleges upon information and belief that under the terms of the policy the defendant Daniel J. Leary has the right to change the beneficiary and the entire policy is subject to his unqualified dominion, control and disposition. The plaintiff further alleges upon information and belief that this insurance policy had a net cash surrender value of approximately $1,372.10 on April 18, 1940. A notice of levy (Treasury Form 668-A) notifying the defendant the Sun Life Assurance Company of Canada of the taxes due the United States jointly and severally from Daniel J. Leary and Sadie D. Leary was served on or about April 18, 1940, on the defendant the Sun Life Assurance Company of Canada. A final notice and demand (Treasury Form 668-C) was served on the defendant the Sun Life Assurance Company of Canada, on or about August 16, 1940. The defendant, the Sun Life Assurance Company of Canada refused, failed and has failed to pay over to the Collector pursuant to such demands any of the property or rights to property belonging to or owned by the defendants Daniel J. Leary and Sadie D. Leary in the insurance policy mentioned above.

XIV.

The Aetna Life Insurance Company issued the following life insurance policies on the life of the defendant Daniel J. Leary:

No. N-211624
No. N-240329
No. P-676922
No. P-697478

The plaintiff is informed, believes and therefore alleges upon information and belief that under the terms of the above-named insurance policies the defendant Daniel J. Leary has the right to change the beneficiary and the policies are subject to his unqualified dominion, control and disposition. Plaintiff further alleges upon information and belief that the above-mentioned insurance policies have cash surrender values available to Daniel J. Leary and Sadie D. Leary, jointly and severally. A notice of levy (Treasury Form 668-A) notifying the defendant the Aetna Life Insurance Company of the taxes due the United States, jointly and severally from Daniel J. Leary and Sadie D. Leary, was served on or about April 18, 1940. A final notice and demand (Treasury Form 668-C) was served on the defendant the Aetna Life Insurance Company on or about August 13, 1940. The defendant the Aetna Life Insurance Company refused, failed and has failed to pay over to the Collector pursuant to such demands any of the property or rights to property belonging to or owned by Daniel J. Leary and Sadie D. Leary in the insurance policies above mentioned.

XV.

The John Hancock Mutual Life Insurance Company issued the following life insurance policies on the life of the defendant Daniel J. Leary:

No. 016057
No. 029689
No. 1993552
No. A-29915
No. A-30515

The plaintiff is informed, believes and therefore alleges that the Diamond Ginger Ale Incorporated of Waterbury, Connecticut, is the beneficiary named in policy No. 19-

93552, and Daniel J. Leary (Son), is the beneficiary named in policies Nos. A-29915 and A-30515. The plaintiff is informed, believes and therefore alleges upon information and belief that under the terms of the above-named insurance policies the defendant Daniel J. Leary has the right to change the beneficiary and the policies are subject to his unqualified dominion, control and disposition. Plaintiff further alleges upon information and belief that the above-named insurance policies have cash surrender values available to Daniel J. Leary and Sadie D. Leary, jointly and severally. A notice of levy (Treasury Form 668-A) notifying the defendant the John Hancock Life Insurance Company of the taxes due the United States, jointly and severally from Daniel J. Leary and Sadie D. Leary, was served on or about April 24, 1940. A final notice and demand (Treasury Form 668-C) was served on the defendant John Hancock Life Insurance Company on or about April 30, 1940. The defendant the John Hancock Life Insurance Company refused, failed and has failed to pay over to the Collector pursuant to such demands any of the property or rights to property belonging to or owned by Daniel J. Leary and Sadie D. Leary in the insurance policies above-mentioned.

XVI.

The plaintiff is advised, believes and therefore avers that the defendants Daniel J. Leary and Sadie D. Leary have property and rights to property in the insurance policies above-named and that said property and rights to property are subject to the claim of the United States for payment of the unpaid income tax liability of Daniel J. Leary and Sadie D. Leary for the years 1933, 1934 and 1935.

XVII.

The plaintiff has a lien under Section 3670 and Section 3671 of the Internal Revenue Code upon the aforementioned life insurance policies, the cash surrender values thereof and on the property or rights to property in said policies to secure the payment of the taxes, penalties and interest due from Daniel J. Leary and Sadie D. Leary, jointly and severally for the years 1933, 1934 and 1935.

XVIII.

Pursuant to Sections 3670, 3671 and 3672 of the Internal Revenue Code, the Collector of Internal Revenue for the District of Connecticut, on or about April 18, 1940, filed notices of tax liens with the Town Clerks of New Haven, Hartford, Waterbury, and Middlebury, Connecticut, and served notice of the liens upon all of the defendants together with notice of levy and demand for payment.

XVIX.

The plaintiff avers that its lien upon the said insurance policies and the rights to property in the policies is superior to the right of the defendant Daniel J. Leary, the defendant Sadie D. Leary, the defendant Daniel J. Leary (Son), the defendants the Travelers Life Insurance Company, Sun Life Assurance Company of Canada, Aetna Life Insurance Company, and the John Hancock Mutual Life Insurance Company, and any and all persons claiming to have an interest in the insurance policies on the life of the defendant Daniel J. Leary.

WHEREFORE, in consideration of the foregoing, the plaintiff prays:

1. The Court enter judgment in favor of the United States against the defendants Daniel J. Leary and Sadie

D. Leary in the amount of $370,261.96, with lawful interest;

2. That in the lien of the United States against Daniel J. Leary and Sadie D. Leary's interest in the named insurance policies be adjudged and decreed superior to whatever rights that may be alleged or claimed by the beneficiaries of the policies, or the insured, or the insurance companies, or any one else claiming an interest in the policies;

3. That the Court adjudge and decree that the property and rights to property of the defendants Daniel J. Leary and Sadie D. Leary in the aforesaid life insurance policies, are subject to the lien of the United States for unpaid income tax, penalty and interest assessed jointly and severally against the defendants Daniel J. Leary and Sadie D. Leary for the years 1933, 1934 and 1935, and that the judgment entered in favor of the United States be ordered paid and satisfied out of the funds available from the cash surrender values of the aforesaid insurance policies;

4. That the defendants Daniel J. Leary and Sadie D. Leary, and the defendant Daniel J. Leary (Son), be ordered to execute whatever documents the Court may find necessary in order that the plaintiff may secure the cash surrender value of the insurance policies or any other amount which represents the propery or rights to property in the insurance policies belonging to the defendant Daniel J. Leary and Sadie D. Leary, jointly and severally, to satisfy the outstanding tax liability against them for the years 1933, 1934 and 1935;

5. That the defendants the Travelers Life Insurance Company, Sun Life Assurance Company of Canada, Aetna Life Insurance Company and John Hancock Life Insur-

ance Company, then be ordered to pay to the United States the value of the property and rights to property of the defendants Daniel J. Leary, and Sadie D. Leary and the defendant Daniel J. Leary (Son) in the aforesaid insurance policies.

6. That the Court give the plaintiff such other general relief both legal and equitable as may be necessary or appropriate for the enforcement of the internal revenue laws and for a decree giving costs and lawful disbursements to the plaintiff.

ROBERT P. BUTLER,
United States Attorney.

Complaint in Civil No. 1707

IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF CONNECTICUT

(Tr. pp. 19-21)

UNITED STATES OF AMERICA

v.

DANIEL J. LEARY and SADIE D. LEARY

NOW COMES, the United States of America, by Adrian W. Maher, United States Attorney in and for the District of Connecticut, and for claim against the above-named defendants alleges as follows:

I

This action is commenced under the direction of the Attorney General of the United States of America; and has been authorized by the Commissioner of Internal Revenue of the United States Treasury Department.

II

During all times hereinafter mentioned the plaintiff has been and now is a corporation sovereign and body politic.

III

On April 29, 1935, the defendants, residents of Connecticut, filed their joint federal income tax return for the calendar year 1934; and on April 29, 1936, filed their

joint federal income tax return for the calendar year 1935. Said returns were filed with the Collector of Internal Revenue for the District of Connecticut.

IV

On April 15, 1940, said Commissioner, having determined a deficiency in said taxes and a penalty for each of said years 1934 and 1935, made jeopardy assessments of said deficiencies, penalties and accrued interest in the amounts for each of the said years as follows:

Years	*Deficiencies in Taxes*	*Penalties*	*Accrued Interest*	*Totals*
1934	$113,949.10	$56,836.16	$34,754.38	$205,538.74
1935	63,636.37	32,387.37	15,590.91	111,614.65
				$317,153.39

V

Said Commissioner's assessment list of said deficiency in taxes, penalty, and interest for each of said years was received by the Collector of Internal Revenue for the District of Connecticut on April 17, 1940, and, on that day, he gave notice of said income tax liabilities to and demanded payment thereof from the defendants.

VI

On June 7, 1940, said Commissioner sent a notice of said deficiencies in taxes by registered mail to said defendants and therein advised them that they may, within 90 days of the mailing of said notice, file a petition with the United States Board of Tax Appeals for a redetermination of said deficiencies in taxes.

VII

On October 9, 1940, the defendants filed a petition with the United States Board of Tax Appeals for a redetermination of said Commissioner's determination of said deficiencies in taxes.

VIII

The Tax Court of the United States (formerly the Board of Tax Appeals), having on January 24, 1945, redetermined said tax deficiencies, entered its decision and order on May 24, 1945, whereby it held and ordered a deficiency of said taxes of the defendants for the said year 1934 of $100,531.92 and a penalty of $50,265.96; and that there was a deficiency in said taxes of the defendants for the year 1935 of $85,472.74 and a penalty of $43,305.55.

IX

No petition for review of said decision of the Tax Court of the United States has been filed; no part of said decision has been set aside or modified; the same has become final; and it is in full force and effect.

X

On December 14, 1945, an assessment was made by said Commissioner for the unassessed portion of the deficiency in taxes and the penalty as redetermined by said Tax Court for said year 1935. Said assessment consists of taxes of $21,836.37, a penalty of $10,918.18 and accrued interest of $12,769.19. For the over assessed amount of the taxes, penalty and interest as redetermined by said Tax Court for said year 1934, said Commissioner has issued a certificate of overassessment for $13,417.18 in taxes, $4,092.25 of the penalty and $6,569.20 in interest.

Said tax liabilities, as readjusted pursuant to the decision of the Tax Court, by the assessment of the unassessed portion on December 14, 1945, of the year 1935 and the issuance of the certificate of overassessment for the year 1934, consist of the amounts for each of said years as herein tabulated as ollows:

Years	Jeopardy Assessments	Assessments of 12/14/45	Certificate of Overassessment	Adjusted Totals
1934	$181,460.11	$	$24,078.63	$157,381.48
1935	111,614.65	45,523.74		157,138.39
				$314,519.87

XI

On December 26, 1945, said Collector of Internal Revenue for the District of Connecticut received the assessment list of said assessment made on December 14, 1945, and on December 28, 1945 gave notice of said assessment for the year 1935 to and demanded payment thereof from said defendants.

XII

No part of said tax liabilities as finally assessed has been paid and the total amount of said liabilities now due is $314,519.87.

WHEREFORE, the plaintiff demands judgment against the defendants for the full amount of $314,519.87, together with interest as allowed by law and for costs.

April 11, 1946.

ADRIAN W. MAHER,
United States Attorney.
EDWARD J. LONERGAN,
Assistant United States Attorney.

Complaint in Civil No. 1708

(Tr. pp. 30-32)

IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,

v.

DANIEL J. LEARY.

NOW COMES, the United States of America, by Adrian W. Maher, United States Attorney in and for the District of Connecticut, and for claim against the above-named defendant alleges as follows:

I

This action is commenced under the direction of the Attorney General of the United States of America; and has been authorized by the Commissioner of Internal Revenue of the United States Treasury Department.

II

During all times hereinafter mentioned the plaintiff has been and now is a corporation sovereign and body politic.

III

On March 17, 1934, the defendant, a resident of Connecticut, filed his federal income tax return for the calendar year 1933 with the Collector of Internal Revenue for the District of Connecticut.

IV

On April 15, 1940, said Commissioner, having determined a deficiency in said taxes and a penalty for said year 1933, made a jeopardy assessment of said deficiency in taxes of $28,254.78, a penalty of $14,540.80 and accrued interest of $10,312.99, making a total assessment of $53,108.57.

V

Said Commissioner's assessment list of said deficiency in taxes, penalty, and interest for said year 1933 was received by the Collector of Internal Revenue for the District of Connecticut on April 17, 1940; and, on that day, he gave notice of said income tax liability to and demanded payment therof from the defendant.

VI

On June 7, 1940, said Commissioner sent a notice of said deficiency in taxes by registered mail to the defendant and therein advised him that he may, within 90 days of the mailing of said notice file a petition with the United States Board of Tax Appeals for a redetermination of said deficiency in taxes.

VII

On October 9, 1940, the defendant filed a petition with the United States Board of Tax Appeals for a redetermination of said Commissioner's determination of said deficiency in taxes.

VIII

The Tax Court of the United States (formerly the Board of Tax Appeals), having on January 24, 1945, redetermined said tax deficiency, entered its decision and order on May 24, 1945, whereby it held and ordered a de-

ficiency in said taxes of the defendant for said year 1933 of $58,554.57 and a penalty of $29,690.69.

IX

No petition for review of said decision of the Tax Court of the United States has been filed; no part of said decision has been set aside or modified; the same has become final; and it is in full force and effect.

X

On December 14, 1945, an assessment was made by said Commissioner for the unassessed portion of said deficiency in taxes and said penalty as redetermined by said Tax Court for said year 1933. Said assessment consists of taxes of $30,299.79, a penalty of $15,149.89 and accrued interest of $21,354.30. Said tax liability, as readjusted pursuant to the decision of the Tax Court by the assessment of the unassessed portion on December 14, 1945 for the year 1933 is of the amount of $119,912.55.

XI

On December 26, 1945, said Collector of Internal Revenue for the District of Connecticut received the assessment list of said assessment made on December 14, 1945 and on December 28, 1945 gave notice of said assessment for the year 1933 to and demanded payment thereof from said defendant.

XII

No part of said tax liability, assessed as aforesaid, amounting to $119,912.55 has been paid.

WHEREFORE, the plaintiff demands judgment against the defendant for the full amount of $119,912.55, together with interest as allowed by law and for costs.

April 11, 1946.

ADRIAN W. MAHER,
United States Attorney
By EDWARD J. LONERGAN,
Assistant United States Attorney.

Plaintiff's Motion for Summary Judgment in Civil Nos. 626, 1707, 1708

(Tr. p. 52)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

[SAME TITLE]

Comes now the United States by and through its attorney Robert C. Zampano, United States Attorney in and for the District of Connecticut, and moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter a summary judgment in favor of the United States of America for the relief demanded in the complaints filed in the above actions, on the ground that there is no genuine issue as to any material fact and that the United States of America is entitled to judgment as a matter of law.

Attached hereto in support of this motion are Government's Exhibits Nos. 1 through 5, inclusive.

ROBERT C. ZAMPANO,
United States Attorney.
By: JAMES J. O'CONNOR,
Assistant United States Attorney.

Partial Summary Judgment in Consolidated Actions

(Tr. pp. 112-113)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[SAME TITLE]

Civil No. 626 (with which has been consolidated Civil No. 1707 and Civil No. 1708).

This case came on to be heard on plaintiff's motion for summary judgment, similar motions having been filed by the plaintiff in Civil Actions numbers 1707 and 1708, and the Court having considered all pleadings, affidavits and exhibits in the three cases and having concluded that the same questions of law and fact are involved between the plaintiff, United States and the defendants, Daniel J. Leary and Sadie D. Leary in all three cases and that in each case there is no genuine issue of fact and no controversial question of fact to be submitted to the trial court concerning these defendants' liability to the plaintiff and the amounts thereof, and having determined that there is no just reason for delay and having directed that judgment be entered consolidating Civil actions numbered 1707 and 1708 with number 626 and for the plaintiff to recover of the defendant Daniel J. Leary $996,278.69 and of the defendant Sadie D. Leary $750,511.09 of said total indebtedness of $996,278.69, now therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Civil Actions 1707 and 1708 are consolidated with this action, Civil number 626; that the plaintiff recover of the defendant Daniel J. Leary the sum of $996,278.69 and of the defendant Sadie D. Leary $750,511.09 of that sum and that the plaintiff recover its costs of action.

Notice of Appeal in Consolidated Actions

Dated at Hartford, Connecticut, this 21st day of May, 1963.

M. JOSEPH BLUMENFELD,
United States District Judge.

Notice of Appeal in Consolidated Actions

(Tr. p. 114)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

[SAME TITLE]

Civil No. 626 (with which has been consolidated Civil No. 1707 and Civil No. 1708).

Notice is hereby given this 17th day of July, 1963, that Daniel J. Yeary and Sadie D. Leary defendants, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment of this Court entered on the 21st day of May, 1963 in favor of plaintiff against said defendants.

WILLIAM H. COLLINS,
844 Shoreham Bldg.,
Wash., D. C.,

ALBERT G. MURPHY,
100 Constitution Plaza,
Hartford, Conn.,
Attorneys for Defendants.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 268

DANIEL J. LEARY AND SADIE D. LEARY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of the United States (O.R. 61–66),[1] in which the amounts of income tax deficiencies and penalties were determined, is reported at 1945 P-H Memo T. C., pars. 45,042 and 45,123. The opinion of the District Court in this collection suit (G.A. 1a-7a) is reported at 228 F. Supp. 467. The *per curiam* opinion of the court be-

[1] The designation "O.R." refers to the original record in the court below; "G.A." refers to Appendix B of the Government's Appendix in the court below (*viz.*, the opinion of the District Court); "A.A." refers to the Appellants' Appendix in the court below. All of these documents have been certified to this Court.

740-980—64

low (Pet. 1a-2a), affirming the judgment of the District Court, is reported at 330 F. 2d 497.

JURISDICTION

The judgment of the Court of Appeals was entered on March 5, 1964 (Pet. 1a-2a), and a petition for rehearing (Pet. 3a) was denied on April 13, 1964. The petition for a writ of certiorari was filed on July 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether both courts below correctly concluded that the record in this case presented no genuine issue of fact and that entry of summary judgment was therefore appropriate.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939, Section 272, 53 Stat. 82, 83:

> SEC. 272. PROCEDURE IN GENERAL.
>
> (a) (1) *Petition to Board of Tax Appeals.* If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its

collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. * * *

* * * * *

(c) *Failure to File Petition.* If the taxpayer does not file a petition with the Board within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

Federal Rules of Civil Procedure:

Rule 56—SUMMARY JUDGMENT

(a) *For Claimaint.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

* * * * *

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * * *

STATEMENT

This suit for the collection of income taxes involves three consolidated District Court actions: (1) Civil No. 626, initiated in 1941 to obtain collection of a jeopardy assessment made on April 15, 1940, and to foreclose tax liens upon certain insurance policies owned by Daniel J. Leary (A.A. 1a, 8a–16a); (2) Civil No. 1707, initiated in 1946 to reduce to judgment a Tax Court determination with respect to the years 1934 and 1935 (A.A. 4a, 17a–20a); and (3) Civil No. 1708, initiated in 1946 to reduce to judgment a Tax Court determination as to 1933 (A.A. 6a, 21a–24a).

On June 7, 1940, the Commissioner of Internal Revenue formally notified the petitioners of deficiencies for the years 1933, 1934, and 1935 (Pet. 7). Ninety days thereafter, on September 5, 1940, petitioners filed a petition for review in the then Board of Tax Appeals, in accordance with Section 272(a) of the Internal Revenue Code of 1939 (O.R. 82). On January 24, 1945, the Tax Court issued its Memorandum Findings of Fact and Opinion determining substantial tax deficiencies for the years 1933 through 1935. It found, *inter alia*, that Daniel Leary was controller of the City of Waterbury, Connecticut, for the years

1931 through 1937; that early in 1938 he and others were convicted of conspiracy to defraud the city of large amounts of money; that when the convictions were affirmed on appeal, Leary (who was at liberty on bail) forfeited his bail bond and fled from Connecticut; and that his whereabouts since then remained unknown to the state authorities and to counsel of record.

The record does not disclose why the instant collection suits remained undisposed of for many years.[2] On October 25, 1962, the government filed motions for summary judgment in all three cases (A.A. 2a, 5a, 7a). Nine exhibits were filed for possible consideration on the motion, including a photostatic copy of the docket of the Board of Tax Appeals (O.R. 82), showing that appellants' petition for review was timely filed on September 5, 1940, rather than on October 9, 1940, as the complaints in two of the cases alleged (A.A. 19a, 22a). Petitioners filed no exhibits or affidavits in opposition (G.A. 3a). The motions were granted on May 17, 1963, and "Partial Summary Judgment" was entered on May 22, 1963 (A.A. 3a, 6a, 7a–8a, 25a–26a). On appeal therefrom, the Court of Appeals affirmed, *per curiam* (Pet. 1a–2a).

[2] The Department of Justice files indicate that, following institution of the suits, petitioner Daniel J. Leary served six years in a Connecticut penitentiary on his conviction for conspiring to defraud the City of Waterbury. He had been apprehended in Chicago in 1946. The Department's files further show that between 1952 and 1961 a drawn-out series of negotiations took place between the government and the petitioners regarding various offers in compromise of the tax liability. The negotiations were complicated by (1) the existence of attachments of the City of Waterbury against much of petition-

ARGUMENT

Petitioners' contention that the record in this case presents a genuine factual issue as to whether the Tax Court had jurisdiction of their case is wholly without substance. Petitioners rely upon the erroneous allegations in two of the government's complaints (A.A. 19a, 22a) that the petition for review was filed in the then Board of Tax Appeals (hereinafter referred to as Tax Court) on October 9, 1940—more than 90 days after the deficiency notices were mailed—and was therefore untimely.[3] But a photo-

ers' property; (2) a related civil suit against Daniel Leary in the amount of $600,000 brought by the City of Waterbury; (3) civil litigation between Daniel Leary and his brother as to the ownership of certain real property on which the federal government had a lien; and (4) disputes as to the ownership of insurance policies in which petitioners were alleged to have an interest.

The District Court in ruling on the motion for summary judgment, stated (G.A. 6a; O.R. 109–110):

> The more than twenty year history of this long drawn out case reveals that the defendants have been accorded every opportunity at many stages in its progression to assert and present any meritorious defenses to these actions they might have. There has, nevertheless, been a persistent and undeviating attempt by Leary to prevent any direct determination of the merits by the courts. * * * There has been no element of mistake, inadvertence, surprise or excusable neglect to hinder Leary from presenting any meritorious defense he might have had.

And the Court of Appeals, in sustaining the grant of summary judgment, observed that it was satisfied "that the delay in obtaining of judgment in the consolidated case was not entirely the fault of the Government" and that "neither the Government nor the taxpayers have been prejudiced" (Pet. 2a).

[3] See Section 272 (a) of the Internal Revenue Code of 1939, *supra*, p. 2.

It should be noted that if the Tax Court had been without

static copy of the Tax Court's docket sheet shows that the petition was filed on September 5, 1940, 90 days after the deficiency notices were mailed on June 7, 1940 (A.A. 18a, 22a; G A. 4a; O.R. 82, 107). The Tax Court therefore had jurisdiction to determine petitioners' tax liability. And since petitioners never appealed from the Tax Court's decision, its findings as to liability are *res judicata* in the present proceeding. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597; *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620, 624.

The pleadings, depositions, affidavits, and admissions filed below clearly demonstrated—and without contradiction by petitioners—that no real issue of fact remained to be disposed of by trial, *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 467; *Sartor* v. *Arkansas Gas Corp.*, 321 U.S. 620, 627. The materials presented below on the motion for summary judgment did not involve any determination of credibility. See *Colby* v. *Klune*, 178 F. 2d 872, 873 (C.A. 2d).

To create a real issue of fact below it was incumbent upon petitioners, once the government had filed the Tax Court docket sheet, to produce (or at least

---

jurisdiction (*i.e.*, if petitioners had elected not to avail themselves of that forum by filing a petition for review within the 90-day period) the only alternative course open to them would have been to pay the assessed tax and bring a suit for refund in the United States District Court. Sections 3772(a)(1) and 3772(a)(2) of the Internal Revenue Code of 1939, now Sections 6532(a) and 7422 of the 1954 Code. In the meantime the government would be free to pursue its statutory collection remedies.

specify) some evidence tending to show that that document was incorrect and that petitioners had not, in fact, filed their petition on September 5, 1940. *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715, 718 (C.A. 2d); *Bruce Construction Corp.* v. *United States*, 242 F. 2d 873, 875 (C.A. 5th). But petitioners made no attempt to meet that burden, nor do they now suggest what evidence they might be able to produce at a trial to demonstrate that they did not file a petition for review on September 5, 1940. Petitioners not only failed to serve opposing affidavits in the District Court, as they were authorized to do under Rule 56(e) of the Federal Rules of Civil Procedure, but they made no attempt to utilize the liberal discovery procedures authorized by the Rules. Their "failure to do so precludes [appellate courts] from finding that they have raised any factual issues which may be considered 'genuine'." *Schneider* v. *McKesson & Robbins, Inc.*, 254 F. 2d 827, 831 (C.A. 2d).[4]

[4] The contention (Pet. 13–17) that petitioners have been subjected to a forfeiture without due process of law is frivolous. It appears to be based on the hypothesis that a taxpayer may file a petition in the Tax Court to review a determination of tax deficiencies by the Commissioner, and then indefinitely frustrate that determination by absenting himself. Here more than four years elapsed between petitioners' filing of their petition and the trial in the Tax Court, ample time for Daniel J. Leary to have arranged for the preparation and presentation of his case. The Tax Court acted within its powers when it decided, pursuant to its Rule 29, that "The unexcused absence of a party or his counsel on the day set for the hearing of any proceeding will not be the occasion for delay. The hearing will proceed and the case will be regarded as submitted on the part of the absent party or parties." Cf. *Katz* v. *Commissioner*, 188 F. 2d 957, 958 (C.A. 2d).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
MEYER ROTHWACKS,
RICHARD B. BUHRMAN,
Attorneys.

AUGUST 1964.

U.S. GOVERNMENT PRINTING OFFICE 1964